

Information held by a public authority for the purposes of the EIR (regulation 3(2))

Environmental Information Regulations

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Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains the circumstances in which information is considered to be held by a public authority for EIR purposes.

Overview

- Information is not considered to be in the possession of the public authority if it is not being held to any extent for its own purposes.
- Information is held for EIR purposes if it is held by the public authority to any extent for its own purposes. This includes information produced or received by the authority relating to its business.
- When information is held by another person on behalf of a public authority, the information is held by the public authority for EIR purposes.

What the EIR say

5. Regulation 3(2) states:

3.—(2) For the purposes of these Regulations, environmental information is held by a public authority if the information—

- (a) is in the authority's possession and has been produced or received by the authority; or
- (b) is held by another person on behalf of the authority.

Information in the authority's possession and produced or received by it

6. Unlike the definition of information held for the purposes of the Freedom of Information Act 2000 (FOIA), the EIR do not explicitly exclude information held by a public authority solely on behalf of another person or body. However information is held for the purposes of EIR if it is in the possession of the authority because it has been produced or received by it. In practice this means that information will be held for EIR purposes if it is held by the authority to any extent for its own purposes. Despite the differences in wording between FOIA and the EIR, similar principles apply.
7. In the same way as under FOIA, the concept of 'holding' information for EIR purposes is not a purely physical concept and has to be understood with the purposes of the EIR in mind. This means that information may be present on a public authority's premises (or even its IT network) but not held by the authority.
8. The use of the phrase "in the authority's possession" could indicate that the scope of what is held under the EIR is much wider than under FOIA, as this may include information that is not held for the authority's own purposes. However information is not in the public authority's "possession" if it is not being held to any extent for its own purposes. This means, for example, that information which is simply stored

by an authority on behalf of someone else is not "held" for the purposes of the EIR.

9. In addition, it is also important to note that regulation 3(2) requires the information to be "produced or received by" the authority. This means that information produced by a member of the public authority's staff in their private capacity would not be held by the authority even if it is on the authority's premises or computer systems.
10. Although the phrase "received by" at first sight suggests that a wider range of information is caught by the EIR, in practice there is no real difference to FOIA because this will, in most cases, refer to situations where there is a positive reason for sending information to a public authority (i.e. which is received by it). In other words, information is received by a public authority because it relates to the work of the authority. Therefore, it can be considered to be held for EIR purposes.
11. This means that a public authority will need to establish whether information is held to any extent for its own purposes. If it is, it will be in its possession and so held for EIR purposes.

Example:

In *Holland v Information Commissioner and the University of Cambridge* (the University) [\[2016\] UKUT 0260 \(ACC\)](#), a request was made for a copy of a review editor's reports relating to the Inter-Governmental Panel on Climate Change. The University said that the information was not held for EIR purposes.

The Upper Tribunal said that the inclusion of the specific and important word "by" in the phrase "produced or received by" showed "that the authority must itself be the producer or recipient of the information". It said that this must mean more than "came into possession of". (para.46)

The Tribunal said that the important consideration was how the information came into the possession of the University, which

was a matter of fact. It said:

"The question is whether the information was produced or received by means which were unconnected with the authority, for example by an individual in their personal or other independent capacity; or whether it was produced or received by means which were connected with the authority, for example by someone acting in their professional capacity in relation to the authority (such as an employee of the authority). The connection must be such that it can be said that the production or receipt of the information is attributable to ("by") the authority". (Para 48)

The Tribunal concluded that the information was not held by the University for EIR purposes because it was not produced or received by it.

Information held to any extent for the public authority's own purposes

12. As with determining whether a public authority holds information for FOIA purposes, each case needs to be considered individually to determine whether a public authority holds information to any extent for its own purposes. However, there are various factors that will assist.
13. The weight attached to each factor will vary from case to case. In some circumstances, one factor may outweigh the others.
14. For example, factors that may indicate information is not held by the public authority to any extent for its own purposes include:
 - the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by another person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or

- the authority is merely providing physical or electronic storage facilities.

15. Factors that are likely to indicate that information is held to some extent for the authority's own purposes are:

- the authority provides clerical and administrative support for the other person, whether legally required to or not;
- The authority controls access to the information;
- The authority itself decides what information is retained, altered or deleted;
- The authority deals with enquiries about the information; or
- Costs arising from holding the information are included in the authority's overall budget.

16. It is important to note that these five factors are only indicative of whether information is held by a public authority for EIR purposes. Public authorities should not adopt a formulaic approach.

17. Whilst these factors might well indicate that an authority holds information, they do not provide the whole picture. For example, where a public authority uses information for its own purposes, but there are restrictions on what it can do with the information, it will still be deemed to hold the information for EIR purposes.

18. Information will not be held for EIR purposes if it is held solely on behalf of another person.

19. **Non-official communications within a public authority** such as trade union communications, for example, will not be held for EIR purposes. The public authority has neither produced nor received the information, and it does not hold the information to any extent for its own purposes. Similarly, in most circumstances, private emails sent or received by staff in the workplace via the public authority's email system would not be held for EIR purposes.

20. Information that is held to any extent for a public authority's own purposes will be held for EIR purposes.

21. **A charitable trust** is a type of charity run by a small group of people known as trustees. Public authorities, usually local authorities, can be trustees of charitable trusts. They could be trustee of a public facility such as a playing field or a leisure centre, or the trustee of funds. When a local authority is the sole trustee of a charitable trust, the information is held for the purposes of the EIR. There is no distinction between the functions the local authority is performing as trustee and the functions it is performing as a local authority. A charitable trust is also not 'another person' in law. It is a legal arrangement whereby trustees act in their own name, using charity funds.

Example

In *Ian Hutchinson v Information Commissioner and Kirklees Metropolitan Council (EA/2017/0194) 23 January 2018*, the council said that it had 'received' a surveyor's valuation report in its capacity as the charitable trustee of Clayton Swimming Bath and Recreation Centre, and not in its capacity as a local authority.

The Tribunal concluded that the information was held by the council. It said:

"The duty of a trustee to act only in the best interests of the trust when dealing with the affairs of the trust does not mean that the local authority as trustee is performing functions distinct from the functions of a local authority" (para. 23); and

"Section 139 expressly confirms the power of a local authority to receive assets and act as a charitable trust...Subsection (1)(a) refers to the acceptance by a local authority, evidently as trustee, of real or personal property for use in the discharge of its functions." (paras 26-28)

It also said "A trust is not a person in law. The only possible other person is Kirklees acting as trustee." (para. 25)

22. In certain scenarios, some information will be held solely on behalf of another person and some information will be held for a public authority's own purposes. Determining whether information is held for EIR purposes depends on the full context.
23. **Local councillors**, for example, are likely to have a number of different roles. Information will not be held for EIR purposes if it relates to their function as elected members (for example, corresponding with residents of their ward, discussing council business with fellow members in the context of voting strategy or campaigning on behalf of a political party). However, some information will relate to the functions of the local authority and will be held for EIR purposes (for example, being a cabinet member and having executive responsibility for a service area, carrying out administrative functions or representing the authority, such as on a regional forum).
24. If a public authority does not hold the information requested because it is held solely on behalf of another person, it should tell the requester that it does not hold the information.
25. If information is held solely on behalf of another public authority, the [regulation 16 code of practice](#) advises that as a matter of good practice, public authorities should:
 - transfer the request to the authority that holds the information for EIR purposes (NB this should only be done with the consent of the requester and following consultation with the other public authority); or
 - inform the requester where to re-direct the request.

Information held by another person on behalf of the public authority

26. There are several circumstances in which information is held by another person on behalf of the public authority and therefore held by the public authority for EIR purposes, for example:

27. **Contracted document storage** is a relatively common arrangement and includes complex storage and retrieval systems as well as arrangements for the keeping of legal documents by a firm of solicitors. In these situations the stored documents will be held on behalf of the public authority.
28. **Local archives and record offices** will often store documents on behalf of public authorities. Even though the records offices are themselves likely to be public authorities, the responsibility for dealing with requests for the information remains with the public authority which holds the information for EIR purposes.
29. **Contractual arrangements** – where information is held by a third party as a result of a contractual arrangement, the provisions of the contract may indicate whether or not the information is held on behalf of the public authority. However, it is necessary to take account of all the circumstances of the case and consider whether there is an appropriate connection between the information and the public authority. For further information, please see our separate guidance [Outsourcing and freedom of information](#), which is also relevant to the EIR.

Example

Both the public authority and the contractor agreed that the following applied to a market research project:

“Leeds City Council and its authorised officers will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all hard and soft copy data must be given over to the council, with no copy remaining – electronic or paper – external to the council. The council has full ownership of the data...”

The Information Commissioner decided that data generated by the contractor falling within this provision was held on behalf of the council.

[ICO Decision Notice FS50118044](#)

This was a FOIA case, but the principles illustrated apply equally to the EIR.

30. **Information held by solicitors** in connection with instructions received from a public authority client will generally be held on behalf of the public authority. However, the distinction is not always clear cut. Solicitors may hold information for their own administrative purposes, for example, which is not held for EIR purposes.
31. **In other situations creating an agency arrangement**, the situation is similar to that between solicitor and client. An 'agency arrangement' includes anyone acting in a professional field who is recognised as acting as their client's agent. This may also extend to situations where another body carries out the functions of a public authority, either through statute or contractual arrangements.
32. **Partnership or consortia arrangements** are forms of collaborative working between two or more organisations. As the organisations do not have the legal status of a body or organisation separate to its members, they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards.
Examples include:
 - local strategic partnerships
 - road safety partnerships
 - local environment partnerships
 - economic partnerships
33. In general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners. As there are various partnership arrangements it is not possible to provide guidance that will cover all of them. Much will depend on the individual arrangements of the partnership as to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them.

Practical considerations

34. In order to comply with the requirements of the EIR, public authorities clearly need to know what information they hold for EIR purposes. This means they need to be aware what information they are holding solely for another person and what information is being held on their behalf by others.
35. With regard to the former, public authorities need to know the basis on which they hold information that is in their possession. With regard to the latter, authorities should know what information is held on their behalf by another person, and also have arrangements in place which allow them to retrieve the information in the event of a request for information being made for it.
36. Good records management is important in this context. Public authorities are advised to follow the good practice which is set out in the Lord Chancellor's [code of practice under section 46](#) of FOIA. This includes, for example, a section on records that are shared with other bodies or held on their behalf by other bodies.

Other considerations

37. This guidance relates only to EIR. Separate guidance is available relating to FOIA:

[Information held by a public authority for the purposes of the Freedom of Information Act](#)
[When is information caught by the FOI Act?](#)

38. Additional guidance about holding information is also available:

[Determining whether information is held](#)
[Official information held in private email accounts](#)

More information

39. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
40. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
41. If you need any more information about this or any other aspect of freedom of information, please contact us
<https://ico.org.uk/global/contact-us/>